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Court of Appeals No. 39546-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLARK COUNTY, WASHINGTON and CITY OF LA CENTER,

Petitioners for Review,

GM CAMAS, LLC., MacDONALD LIVING TRUST and
RENAISSANCE HOMES,

Respondents Below,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
REVIEW BOARD, JOHN KARPINSKI, CLARK COUNTY NATURAL
RESOURCES COUNCIL and FUTUREWISE,

Appellants.

SUPPLEMENTAL BRIEF OF PETITIONER CLARK COUNTY

ANTHONY F. GOLIK
Prosecuting Attorney for Clark County, Washington

CHRISTINE M. COOK #15250
Deputy Prosecuting Attorney
Attorney for Petitioner Clark County
Clark County Prosecuting Attorney, Civil Division
PO Box 5000
Vancouver WA 98666-5000
Tele: (360) 397-2478
Fax: (360) 397-2184
Email: christine.cook@clark.wa.gov

ORIGINAL

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I. ASSIGNMENT OF ERROR

The Court of Appeals misconstrued and misapplied the Growth Management Act in ruling that the Growth Management Hearings Board, Clark County, and the Court of Appeals itself, had jurisdiction over the comprehensive plan designations of land brought into urban growth areas and annexed by cities before the Growth Board had issued its decision, although no party had sought to prevent or had challenged the annexations.

The Supreme Court's Order granting review states that the court will consider two issues on review: jurisdiction, and the annexation of Area CA-1¹. The Order does not limit the issue of jurisdiction to any of the particular aspects of judicial or administrative authority that are implicated by the Court of Appeals' decision. Clark County, however, will limit this brief to the jurisdictional questions that were decided by the Court of Appeals in a manner that contravenes the Growth Management Act, Chapter 36.70A RCW (GMA) and related law. In general, the issue wrongly decided by the court is which agency, municipality or court retained or acquired authority to rule on growth management matters for the lands that were annexed by the Cities of Camas and Ridgefield prior to issuance of the Growth Board's decision concerning the designations of those lands. *See, Clark County v. Western Washington Growth*

¹ The majority, but not all, of Agricultural Viability Study Area CA-1 (Area CA-1) was annexed by the City of Camas. Clark County removed the remainder of Area CA-1 from the Camas Urban Growth Area and returned that land to agricultural designation, in compliance with the order of the Growth Management Hearings Board.

Management Hearings Board, 161 Wn.App. 204, 215-16, 221-26, 254

P.3d 862 (2011). The Court of Appeals misconstrued and misapplied the relevant provisions of GMA in its decision on jurisdiction.

II. STATEMENT OF THE CASE

Clark County will rely upon the statements of factual background to this review that are set forth in its brief to the Court of Appeals at 1-10 and its Joint Petition for Review to this Court at 3-9. Certain relevant procedural facts are noted here.

Clark County adopted its Comprehensive Growth Management Plan update at the heart of this review by ordinance on September 25, 2007. John Karpinski, Futurewise, and the Clark County Natural Resources Council appealed the plan update to the Western Washington Growth Management Hearings Board (Growth Board) in November 2007. The Growth Board issued its final decision and order on May 14, 2008, affirming the update in part and holding that portions of the update were not compliant with GMA. Additionally, the final decision and order determined that new urban comprehensive plan designations of certain former agricultural lands of long term commercial significance (ALCS) were invalid pursuant to RCW 36.70A.302. The Growth Board issued an amended decision and determination of invalidity on June 3, 2008.

Prior to issuance of the Growth Board decision in May, cities within Clark County annexed three of the study areas, which had been formerly designated as ALCS, but which the plan update designated for urban uses and included in urban growth areas. Effective April 26, 2008, Area CB was annexed in its entirety by the City of Camas, as was the greater portion of Area CA-1 (approximately 327.06 of 342.56 acres).² In compliance with the Growth Board's order, Clark County redesignated the remaining 15.5 acres of Area CA-1 as Resource Agriculture (AG-20) (an ALCS designation) and removed them from the Camas UGA.³ Most of Area RB-2 was annexed by the City of Ridgefield, effective on April 20, 2008.⁴ Clark County has redesignated the remainder of Area RB-2 for Resource Agriculture (AG-20) and removed it from the Ridgefield UGA.⁵

No party sought to stay, enjoin, prevent by writ, appeal or in any way challenge the annexations of these lands by Camas and Ridgefield, until the Court of Appeals raised the issue *sua sponte* in 2010.

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² Compliance Order, *Appendix 2 to Brief of Respondent Clark County to Court of Appeals (Ct. App. Brief)* at 8; Ordinance 2009-12-15, *Appendix 6 to Ct. App. Brief*.

³ Ordinance 2009-12-15, *Appendix 6 to Ct. App. Brief*.

⁴ Compliance Order, *Appendix 2 to Ct. App. Brief* at 8; Ordinance 2009-12-15, *Appendix 6 to Ct. App. Brief*.

⁵ Ordinance 2009-12-15, *Appendix 6 to Ct. App. Brief*.

III. ARGUMENT

Jurisdiction over the status of the annexed lands by agencies and tribunals at four levels is implicated by the Court of Appeals' decision. According to the Court of Appeals, the Growth Board retained authority to rule on the proper designations by the Clark County comprehensive plan of the annexed lands following the annexations into cities.⁶

The court's conclusion to this effect presupposed that Clark County retained jurisdiction to make comprehensive plan designations for those lands after the lands had been annexed by cities. Absent that assumption, the Growth Board's ruling on the county's plan designations of the annexed lands would have been ineffective.⁷ No provision in either Chapter 36.70A RCW or Chapter 35.13 RCW, however, authorizes or permits the Growth Board to require that an annexation be undone so that a county may exercise planning authority over the formerly annexed land.

An order by the Growth Board to that effect would also contravene the law which establishes the authority of cities to regulate the development of land within their own municipal boundaries. *Wash.*

⁶ Clark County v. Western Washington Growth Management Hearings Board, *supra*, at 225-26.

⁷ The court's assumption was incorrect. As a matter of law, the Growth Board's decision as to the annexed land was ineffective.

*Const. Art. XI, Sect. 11;*⁸ *RCW 35.63.080;*⁹ *RCW 35A.11.020.*¹⁰ If the Growth Board retained the ability to direct Clark County to redesignate the annexed lands as ALCS, it follows that the cities could not properly exercise jurisdiction either to annex those lands or to plan for the areas that they had annexed.

The Court of Appeals arrived at these conclusions by creating a new doctrine of finality, based upon no judicial precedent and no statutory authority:

County decisions related to the GMA that are timely challenged and pending review before the Growth Board and/or an appellate court are not final and cannot be relied on until either (1) the Growth Board's final order is not appealed or (2) the county's decisions are affirmed and a final order or mandated opinion is filed by a court sitting in its appellate capacity.¹¹

A. The decision of the Court of Appeals regarding finality directly violates RCW 36.70A.302(2).

The court's new rule is contrary to the Growth Management Act.

The Court of Appeals promulgated the rule by construing the relevant statutory provisions and concluding that the legislature could not have

⁸ Wash. Const. Art. XI, Sect. 11 states: "Any county, city town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

⁹ This general law authorizes a city council or board of commissioners to provide for preparation, adoption and enforcement of coordinated plans for the physical development of the municipality.

¹⁰ This general law authorizes code cities to regulate real property.

¹¹ 161 Wn. App. at 225.

meant what it had clearly said. Because it is contrary to governing statutes, the court's rule is erroneous.

First, the growth board's decisions to invalidate legislation do not have retroactive effect. RCW 36.70A.302(2) states:

A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project. (*Emphasis added.*)

The Court of Appeals construed this statute so as to read out of the law the highlighted clause above. The court explained that the Cities of Camas and Ridgefield had no vested rights in annexing territory, and, therefore, this statute did not operate to allow the annexation of land whose plan designation as urban was under pending appeal.¹² The court should have given effect to the plain language of the statute, the entire statute, without omitting the initial, unambiguous clause of the statute: a determination of invalidity is prospective in effect. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

The Court of Appeals ignored the crucial first statement of RCW 36.70A.302(2), and instead focused on the statutory language that follows

¹² Clark County v. Western Washington Growth Management Hearings Board, *supra*, at 225.

and follows from that first statement. The statute, without qualification, provides that, “A determination of invalidity is prospective in effect . . .” Every subsequent portion of the statute is a consequence of the prospective effect of the determination. Nothing in the statute suggests that a determination of invalidity is, in some circumstances, retroactive. Nothing in the statute states or implies that until the golden moment of finality, which could be years in the future, private property owners and local governments must treat lands whose designations have been appealed as if the designations had been invalidated at the filing of the appeal. That, however, is the consequence of the court’s rule.

In support of its rule, the Court of Appeals cites the possibility of abuse by a county that could “draw out the appeal”¹³ of a UGA expansion until lands whose dedesignations from resource use could be annexed, thus rendering GMA unenforceable.¹⁴ The court did not recognize the real possibility of abuse arising from its new finality rule: any party can now significantly delay a legitimate action based upon legislation under GMA simply by appealing the legislation to the growth board, and beyond. The legislature recognized that possibility, however, by making a determination of invalidity prospective in its effect.

¹³ Id.

¹⁴ Id.

That the first statement of RCW 36.70A.302(2) means what it says is supported by other statutes governing appeals to the growth board.¹⁵ RCW 36.70A.320 states that in general, a comprehensive plan and development regulations adopted under GMA are presumed valid upon adoption. The Court of Appeals correctly notes that this statement establishes the standard of review for the growth board.¹⁶ The presumption in RCW 36.70A.320 that appealed legislation is valid until proven otherwise, however, is entirely consistent with construing RCW 36.70A.302(2) to give appealed legislation effect until a finding is issued that the legislation has been proven invalid.

Similarly, a growth board's finding of noncompliance with GMA does not necessarily prevent a city or county from acting upon appealed legislation which has not been invalidated. *RCW 36.70A.300(4)*. The Court of Appeals again correctly notes that this statute concerns the period of remand.¹⁷ Under the court's new rule, however, if an appeal continued past the growth board's order of remand, local legislation would be ineffective until it was finally affirmed by an appellate court. That result,

¹⁵ See, *Dep't of Ecology v. Campbell & Gwinn, LLC*, *supra*, at 10 (a provision's plain meaning may be ascertained by an "examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found.").

¹⁶ *Clark County v. West, Washington Growth Management Hearings Board*, *supra*, at 224.

¹⁷ *Id.* at 225.

now mandated by the Court of Appeals in this case, is flatly contrary to the plain language of RCW 36.70A.302(2).¹⁸

The Court of Appeals' decision misconstrues GMA to contradict the strong policy in Washington law favoring finality in land use matters, including legislative decision making. In Thurston County v. Central Puget Sound Growth Management Hearings Board, 164 Wn.2d 329, 189 P.3d 38 (2008), the Supreme Court held that updating and revising portions of a comprehensive plan would not throw the entire plan open to appeal on the grounds that some parts had not been revised. The court reasoned as follows:

Finality is important because "[i]f there were not finality, no owner of land would ever be safe in proceeding with development of his property" (*citation omitted*).¹⁹

The Court of Appeals' rule that legislation pending appeal is not final is not necessary for enforceability of GMA, regardless of its concerns to that effect.²⁰ Any party that wanted to prevent the county's plan update from being acted on could have sought a stay of the effectiveness of the

¹⁸ The rule that local legislation under pending appeal is ineffective because it is not final also ignores the distinction between noncompliance and invalidity that the legislature has established throughout RCW 36.70A.302, RCW 36.70A.305, and RCW 36.70A.320(4).

¹⁹ Thurston County v. Central Puget Sound Growth Management Hearings Board, *supra*, at 345.

²⁰ Clark County v. West. Washington Growth Management Hearings Board, *supra*, at 225.

updated provisions, or could have challenged the annexations based upon those provisions. No party sought a stay, or went to court to prevent annexation.

Pursuant to RCW 36.70A.302(2), the plan update was effective until it was determined invalid, during which time the lands at issue in this review were annexed by cities. Washington law does not justify the holding of the Court of Appeals that the Growth Board's determination was retroactive in effect, thereby preventing the prior annexation of dedesignated lands.

B. The Growth Management Hearings Board has no jurisdiction over annexation or over lands that have been annexed.

The Court of Appeals erred when it ruled that the Cities of Ridgefield and Camas had improperly annexed lands whose designations as agricultural or urban were at issue before the Growth Board. The cities were not parties to the Growth Board review. Annexation of the disputed lands was not before the Growth Board; the Growth Board is not authorized to rule on the propriety of an effective, unappealed annexation.

RCW 36.70A.280(1)(a) sets forth the subject matter jurisdiction of the growth board, in relevant part, as follows:

- (1) The growth management hearings board shall hear and determine only those petitions alleging either:
 - (a) That, except as provided otherwise by this subsection, a state agency, county, or city planning

under this chapter is not in compliance with the requirements of this chapter

RCW 36.70A.280(1)(a) expressly limits the growth board's jurisdiction, and the courts are not to rewrite or liberally construe that statute.²¹ This Court has recognized the limited subject matter jurisdiction of the growth board on several occasions. *See, Thurston County*, 164 Wn.2d 329, *supra*, (failure to revise comprehensive plan cannot be appealed to growth board unless revision mandated by change in statute); *Feil v. Eastern Wash. Growth Management Hearings Board*, 172 Wn.2d 367, 377-81, 259 P.3d 227 (2011) (site-specific project permit cannot be appealed to growth board even if regulation governing permit is inconsistent with GMA); *Woods v. Kittitas County*, 162 Wn.2d 597, 614, 174 P.3d 25 (2007) (site-specific rezoning decision cannot be appealed to growth board); *Skagit Surveyors & Engr's, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 567, 958 P.2d 962 (1998) (Growth Board lacked jurisdiction to review pre-GMA ordinances for compliance with GMA).

A Growth Board may not rule on annexations, which are not accomplished pursuant to GMA. In an appeal of the Growth Board's ruling, the Court of Appeals does not possess power to extend its own

²¹ *Skagit Surveyors & Engr's, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558-67, 958 P.2d 962 (1998).

jurisdiction, and that of the growth board on remand, to entities and matters that were never before the growth board in the first instance.

C. Planning jurisdiction over lands that were annexed prior to issuance of the growth board decision lies with the cities that annexed those lands.

Upon annexation of land by a city, a county loses its ability to plan for the growth management of that land; the land is within a jurisdiction other than the county.²² The Growth Boards have acknowledged this jurisdictional truth, when as a consequence of annexation, lands whose designation has been in dispute are effectively removed from appeals. This was the finding of the Growth Board regarding dedesignated land that had been annexed by the City of Arlington, for example.²³

RCW 36.70A.302(2) prevents a Growth Board's order of invalidity from retroactively nullifying an annexation. Clark County lost planning jurisdiction over the lands annexed by Camas and Ridgefield before the Growth Board issued its decision in this case. Consequently, the Growth Board's decision concerning those lands could have no effect on Clark County. The Washington Supreme Court has stated: "A case is moot if a

²² RCW 35.63.080; RCW 35A.11.020.

²³ 1000 Friends of Washington v. Snohomish County, CPSGMHB Case No. 03-3-0019c, Compliance Order in Remand, February 19, 2009.

court can no longer provide effective relief.”²⁴ By the Supreme Court’s standard, the Growth Board’s review was certainly moot as it concerned the annexed portions of Areas CA-1, CB, and RB-2. Because the appeal as to those areas was moot, the Court of Appeals should not have ruled upon their county comprehensive plan designations. The court’s erroneous doctrine of finality could not serve to create jurisdiction over these lands in the county, the growth board, and the court itself.

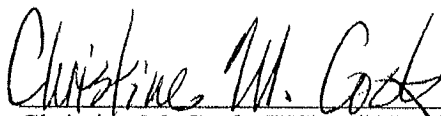
IV. CONCLUSION

For these reasons, Clark County respectfully requests that the Court reverse the decision of the Court of Appeals.

DATED this 19th day of December, 2011.

Respectfully submitted:

By:



Christine M. Cook, WSBA#15250
Deputy Prosecuting Attorney
Attorney for Petitioner Clark County
Clark County Prosecuting Attorney
Civil Division
PO Box 5000
Vancouver WA 98666-5000
Tele: (360) 397-2478
Fax: (360) 397-2184
Email: christine.cook@clark.wa.gov

²⁴Orwick v. Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (case moot because citations against petitioners dismissed before trial court hearing).